

IN THE SUPREME COURT OF IOWA

Supreme Court No. 15-1191

SPENCER JAMES LUDMAN,

Plaintiff-Appellee/Cross-Appellant,

v.

DAVENPORT ASSUMPTION HIGH SCHOOL,

Defendant-Appellant/Cross-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY
THE HONORABLE NANCY S. TABOR

**PLAINTIFF-APPELLEE'S FINAL BRIEF
AND REQUEST FOR ORAL ARGUMENT**

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SPENCER JAMES LUDMAN**

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STATEMENT OF ISSUES

- I. THE DISTRICT COURT CORRECTLY DENIED ASSUMPTIONS MOTION FOR DIRECTED VERDICT ON THE CLAIM OF NO DUTY-PLAINTIFFS PROVED CONCLUSIVELY THAT THERE IS NO INHERENT RISK OF BEING STRUCK BY A FOUL BALL WHEN A BASEBALL PLAYER IS STANDING INSIDE A DUGOUT CONSTRUCTED AND MAINTAINED WITH DUE CARE.

Cases:

Thompson v. Kaczinski 774, N.W. 2nd 829 (Iowa 2009) at 832

Dudley v. William Penn College 219, N.W. 2d. 484, Iowa 1974 at 486.

Koenig v. Koenig 766 N.W. 2d. 635 (Iowa 2009)

Sweeney v. City of Bettendorf 762, N.W. 2d. 873 (Iowa 2009)

Nichols v. Westfield Industries. Ltd. 380 N.W. 2d. 392, 399 (Iowa 1985)

Feld v. Borkowski 790 N.W. 2d, 72, (Iowa 2010)

- II. PLAINTIFF SPENCER LUDMAN PRESENTED AMPLE EVIDENCE TO SUPPORT THE JURYS' FINDING THAT ASSUMPTION WAS NEGLIGENT AND THAT ASSUMPTIONS NEGLIGENCE WAS A CAUSE OF PLAINTIFFS PERMANENT BRAIN INJURY.

Cases:

Koenig v. Koenig, 766 NW 2nd 635 (Iowa 2009).

- III. THE DISTRICT COURT PROPERLY EXCLUDED ASSUMPTION'S PROFFERED EVIDENCE CONCERNING OTHER BASEBALL DUGOUTS, AS THE EVIDENCE WAS IRRELEVANT, LACKED CRUCIAL FOUNDATION, AND

DEMONSTRATED NO ACCEPTED CUSTOM AND PRACTICE
OF DUGOUT PLACEMENT OR DESIGN.

Cases:

Heinz v. Heinz, 653 NW 2nd 334, 338 (Iowa 2002)

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Other Authorities:

See IRE 5.403

IV. THE DISTRICT COURT CORRECTLY REFUSED TO SUBMIT
PROPER LOOKOUT AS AN ALLEGATION OF COMPARATIVE
FAULT.

CROSS APPEAL ISSUE

V. THE DISTRICT COURT ERRED WHEN IT FAILED TO GRANT
PLAINTIFFS MOTION FOR DIRECTED VERDICT
CONCERNING PLAINTIFFS ALLEGED COMPARATIVE FAULT
FOR MERELY STANDING IN OR NEAR THE SOUTH
DOORWAY OF THE ASSUMPTION DUGOUT.

Cases:

Coker v. Abell-Howe Company 491 NW 143 (Iowa 1992)

ROUTING STATEMENT

Plaintiff agrees that the Iowa Supreme Court should retain this case because it presents fundamental issues of law affecting the health and safety of Iowa's children and young adults participating in sponsored school sports programs while the student athlete a) is not engaged in actual play, and b) while he or she is required to occupy a portion of the sports facility provided for his or her protection while not on the field. Of equal importance is this court's authority to define and identify hazards or risks of participation in high school sports or activities which can and should be minimized, or as in this case, completely eliminated by reasonable care. Iowa R. App. P. 6.1101(2) (d) and (f).

PLAINTIFF -APPELLEE'S AND CROSS-APPELLANT'S SEPARATE STATEMENT OF THE CASE

A. Nature of the Case

Pursuant to Iowa R. App. P. 6903(3), plaintiff-appellee and cross-appellant Spencer Ludman submits this statement of the case as he is dissatisfied with the statement of the case submitted by defendant-appellant.

This premises liability action arises out of an incident in which a high school baseball player sustained a severe skull fracture with resulting permanent brain injury, when he was struck in the head by a foul ball while

standing inside the Assumption visitor's dugout during a regular season game on the afternoon of July 7, 2011.

Assumptions baseball field was used for over a decade before 2011, for regular high school baseball games involving players ranging in age from fourteen to eighteen. Assumptions visitors' dugout sat parallel (running north and south) to the first baseline. It was also situated in an area where foul balls from right handed batters often hit, or entered the visitors' dugout. The visitor's dugout was two and half feet below ground, and only partially screened for foul ball protection. It was thirty-five feet long with only twenty-five feet of fencing in the middle for foul ball protection on the side facing the field of play. This left two thirty-five square foot openings at each end. The north door was approximately fifty feet from home plate. The south door was approximately sixty feet from home plate.

As late as the spring of 2011, Assumption made some improvements to the visitor's dugout, but failed to complete or gate the protective fence. At trial, it was undisputed that batters, especially right-handed batters often hit foul balls which struck or entered the visitors' dugout.

On the afternoon of July 7, 2011, Spencer Ludman was playing baseball for Muscatine High School as Muscatine played Assumption at Assumption's field.

During the fifth inning, while Muscatine was on offense, plaintiff Spencer Ludman prepared to bat. He went to the south end of the visitors' dugout where visiting players normally waited to emerge "on deck". There were two outs against Muscatine. If the batter struck out, Ludman and his team would retake the field. If the batter got a hit or walked, plaintiff would emerge from the dugout and take the position on deck with his batting helmet on.

The visitors' dugout was extremely crowded with most of the Muscatine players and their equipment. Muscatine coach Robert Leech had a rule unique to the Assumption visitors' dugout. Coach Leech forbade his coaches and players from sitting or standing near the north doorway closest to home plate due to the proximity of the batter's box and the likelihood of a foul ball entering the dugout at high speed. Even the protective fence in the middle twenty-five feet of the dugout would not protect all players behind it due to the angle of entry from home plate. (See Figures 1, 2 & 3)

At the time of his injury, Spencer Ludman was required by the rules to occupy the Assumption visitors' dugout when not on the field of play. Coach Leech had no rules against standing in the south doorway. All eyewitnesses confirmed that at the time Spencer Ludman was hit, he was watching the game.

There were two outs and the Muscatine batter (Brooks Wagner) had two strikes against him. The next pitch was a fastball. The Muscatine batter swung late, sending a line-drive foul ball straight into the unprotected south doorway of the visitors' dugout. Plaintiff Ludman was facing the field and watching the game. He testified he saw the ball coming from his left in his peripheral vision. All eye witnesses confirmed that Ludman tried to turn away, but the line drive traversed the short distance in what all witnesses described as a split second. The foul ball slammed into the left side of Ludman's head before he could get out of the way, fracturing his skull and causing permanent brain damage.

Assumption coach William Argo testified that he observed Ludman see the foul ball coming at him in the dugout and that he raised his arm in an attempt to "defend" himself.

Plaintiff sued Assumption High School alleging that it was negligent for locating the visitor's dugout so close to home plate, and in a prime foul ball zone from right handed batters, creating a high probability of injury to coaches and players in the dugout. He alleged that Assumption was negligent for failing to provide a reasonably safe visitors' dugout because of the open unprotected doorways at each end of the dugout.

At trial plaintiffs witnesses (lay and expert) discussed, at length, the uniquely dangerous situation created by Assumptions visitors' dugout, and several methods which Assumption could and should have employed to completely alleviate the hazard. These included:

- a) Putting gates on the doorways to provide full protection across the entire area of the dugout exposed to the playing field.
- b) Installing L-shaped fence/barriers to prevent thrown or hit balls and bats from reaching the doorways.
- c) Moving the entrance/exit to the visitors' dugout to the south end, with an offset barrier fence.
- d) Moving the dugout back another thirty feet as recommended by the National High School Athletic Association Recommendations for field layout.

During trial, Assumption admitted that the safety measures suggested by plaintiff were feasible, and that the school did not consider any of the additional protection cost prohibitive. Instead, Assumption asserted Assumption had no duty to protect players in the dugout from foul balls because high school baseball players all know they could get hit on the field of play and so they assumed the risk of get hitting with a foul ball, even while in the dugout, and not playing the game. Assumption offered

testimony that had taken no remedial measures to protect players in the visitor's dugout after plaintiff's injury, because they had reviewed the situation and determined that their visitors' dugout provided reasonable protection. On redirect Assumption management stated it would only review the visitors' dugout foul protection if a player was actually killed by a foul ball during a game.

Assumption also asserted comparative fault on the part of plaintiff, alleging:

- a) Ludman was negligent for merely standing in or near the south doorway at the time.
- b) Ludman was negligent for removing his batting helmet before the foul ball was hit into the dugout.
- c) Ludman was negligent for failing to keep a proper lookout.

At the close of the evidence, Assumption withdrew the allegation of comparative fault based on the removal of the batting helmet, but urged its remaining issues (a & c). The District Court found that, based on the evidence before it, defendant had not met its burden of proof with respect to any alleged failure to keep a proper lookout, as even defendant's eyewitness admitted Ludman was looking at the field of play when the Muscatine batter hit the foul that flew into the south door.

Plaintiff made a motion for directed verdict on the remaining allegations of comparative fault. The District Court granted plaintiff's motion with respect to Ludman's alleged failure of lookout but denied the motion for directed verdict on the allegation of unreasonable failure to avoid risk of injury.

On appeal, the issues are:

1) Whether the "inherent risk doctrine" operates to reduce, or completely eliminate the common law duty of Assumption to use reasonable care in the construction and maintenance of its visitors' dugout to protect Iowa athletes who are required to remain in the dugout, and while not actually playing baseball.

2) Whether plaintiff presented sufficient evidence at trial to prove that Assumption was negligent, and that Assumption's negligence was a cause of damage to the plaintiff.

3) Whether Assumption's was entitled, under the guise of "custom and practice" to present evidence of other, dissimilar dugouts when the undisputed evidence demonstrated that there was no "custom and practice" contained in the proffered evidence.

4) Whether Assumption failed to provide sufficient foundation to qualify its proffered evidence of other baseball diamonds and dugouts for

any purpose that would outweigh the confusion and unfair prejudice its admission would have created.

5) Whether the District Court correctly ruled that Assumption had failed to provide sufficient evidence of lack “proper lookout” to generate a jury question at the close of the evidence.

6) **Issue On Cross Appeal.** Whether the District Court erred when it denied plaintiff’s motion for directed verdict on the issue of plaintiff’s alleged comparative fault for merely standing in the south doorway.

B. Relevant Proceedings. Plaintiff filed his original petition on April 5, 2013. Defendant Assumption filed its answer on May 8, 2013. Before trial, defendant Assumption filed its first motion for summary judgment based on the “contact sports exception” on July 28, 2014. Plaintiff resisted the first motion for summary judgment. On August 15, 2014 the District Court correctly found that, based on the facts of this case, the contact sports exception did not apply as between Ludman and the owner/occupier of the dugout (Assumption). Shortly before trial Assumption filed a second motion for summary judgment alleging that Assumption owed Ludman no duty of due care based upon the “inherent risk” or “limited duty”

doctrine. Again, plaintiff filed his resistance, and the District Court denied the second motion for summary judgment.

Before trial, the parties filed various motions in limine, which were heard before the Honorable Nancy Tabor on or about June 5, 2015. Plaintiff had filed a motion in limine to exclude defendant's proffered evidence simply showing other dugouts in the same conference as Assumption. While the evidence was offered to show "custom and practice", the proffered evidence clearly demonstrated, and defendant's expert admitted at trial that all of the dugouts were designed differently, with different types and levels of protection from foul balls. Three of the proffered dugouts had full screening similar to that protection urged by the plaintiff in his case and chief. In addition, Assumption failed to provide crucial foundation for any comparison of relevance between the "other dugouts" and Assumptions visitor's dugout. Assumption failed to:

- a.) Provide the distance and angle of the proffered dugouts from home plate.
- b.) Provide the size and elevation of each other dugout.
- c.) Provide any comparison of the frequency of foul balls hitting each "other dugouts" with Assumptions experience.

d.) Provide any background or history concerning the design and foul protection of each proffered dugout.

Each other dugout had a distinctly different lay out, parameters, elevation and foul protection. There was no standard or custom common to these dugouts.

The court sustained the motion in limine and ruled that the parties were not to refer to other dugouts during the case, but to limit themselves to precise facts before the jury concerning Assumptions facility.

Jury trial commenced on June 22, 2015, before District Court Judge Nancy Tabor. At trial, plaintiff called the following witnesses:

1. Nathan Panther-former Muscatine baseball assistant coach/eyewitness.
2. Shawn Ravenscroft-former Muscatine baseball coach/eyewitness.
3. Scott Burton-retained expert witness in the field of recreational safety and ASTM standards for fencing of dugouts.
4. William Argo-Assumption baseball coach/eyewitness.
5. Wade King-Assumption Athletic Director.
6. Spencer Ludman –plaintiff.
7. Robert Leech-former Muscatine baseball coach/eyewitness.
8. Laurie Ludman-plaintiffs mother/partial eyewitness.
9. Jim Ludman-plaintiffs father/eyewitness.

10. Dr. Matthew Howard MD. UIHC treating physician. (By deposition-record deposition exhibit 19)
11. Dr. David S. Demarest Phd. retained expert-via videotaped deposition-record exhibit 18)
12. Dr. Irena Charysz-Birski MD -treating physician for ongoing seizures by videotaped deposition –record exhibit 23).

Defendant Assumption called the following witnesses:

1. Greg Gowey-retained expert, architect.
2. Tim Goodman-former Muscatine Athletic Director.
3. Andy Craig-Assumption High School president.

At trial, the plaintiff produced evidence that the Assumption dugout was unusually dangerous due to the proximity of home plate and the open doorways of the dugout. Plaintiff also demonstrated that the dugout was in a prime strike zone from right handed batters. Assumption management had seen foul balls strike and indeed, enter the visitor's dugout before Ludman's injury.

During trial, defendant Assumption made an offer of proof through its expert witness, Greg Gowey. Gowey admitted that he had no information concerning the precise distance or location of any of the "other dugouts" relative to home plate. He admitted that he had no information about the history of the fields and dugouts or their design and why they were designed

as shown in the photographs. Finally, Govey admitted that the proffered “custom and practice” dugouts were all designed differently.

On June 30, 2015, the jury returned a verdict in the total amount of \$1,500,000.00. The jury also found 30% fault on the part of Ludman, based upon the alleged unreasonable failure to avoid injury. The court deducted 30% from the total verdict, and entered judgment in favor of Ludman in the amount of \$1,033,216.68.

Defendant Assumption filed a timely notice of appeal and plaintiff filed a timely notice of cross appeal with respect to the comparative fault issue.

C. Disposition of the Case in the District Court.

The jury found that Assumption was negligent, and that Assumptions negligence was a cause of damage to the plaintiff. They also found that plaintiff was negligent and that his negligence was a cause of damage to the plaintiff. The verdict apportioned negligence 70% to Assumption and 30% to plaintiff Spencer Ludman. The jury then valued plaintiff total damages at \$1,500,000.00. The Court, with the agreement of the parties, adjusted the award of past medical expenses to be consistent with the evidence and, after deduction for 30% comparative fault, entered judgment for plaintiff in the amount of \$1,033,216.68

STATEMENT OF FACTS

Pursuant to Iowa R. App. P. 6.903(3), plaintiff-appellee and cross-appellant provides this separate statement of facts. Defendant's statement of facts omits important facts which plaintiff asserts should determine the correct outcome of this appeal. Defendant's statement of facts contains no mention of that fact that plaintiff conclusively established that there is no inherent risk of being hit by a foul ball, a thrown bat, or an overthrow when a player is in a dugout located, constructed and maintained with reasonable care. Finally, defendant's statement omits portions of the record which demonstrate this action has no effect on the game of baseball in any way, except to make it safer for players and coaches not on the field of play if the District Court is affirmed.

The Davenport Assumption baseball field was laid out and designed over twenty years before plaintiff's injury. (App. 339, Tr. 847:14-852:2; App. 535 Ex. E). Before plaintiff's injury on July 7, 2011, the chain of responsibility and authority for the safety of the baseball facility started with Baseball Coach William Argo, up the chain of command to athletic director Wade King and finally Assumption President, Andy Craig. (App. 337; Tr. 840:9-844:8). Assumption charged admission for baseball games. (App. 264; Tr. 512:2-512:9).

The visitor's dugout at Assumption was different from the home dugout. (App. 302, Tr. 662:17-663:9; App. 403 Ex. 34-7). The visitors' dugout was sub grade, sunken approximately two and half feet below the level of the playing field. (App. 246, Trans 426:19-427; Compare App. 403 Ex. 34-7 to App. 431 Ex 47, App. 432, Ex. 48 and App. 433, Ex 49). The home dugout was level with the playing field. The location of the Assumption visitors' dugout presented a uniquely dangerous foul ball hazard for anyone standing inside the dugout. (App. 213 Tr. 287:9-289:17; App. 227, Tr. 344:5-347:2; App. 301, Tr. 657:18-660:4; App. 430, Ex. 46; App. 431, Ex. 47; App. 432, Ex. 48; and App. 433, Ex 49). The visitor's dugout ran north and south, only thirty feet from the first base line. While the dugout was thirty-five feet long, only twenty-five feet of the side facing the field of play was fenced from ground to roof, leaving two 5 foot by 7 foot unprotected doorways at each end. (App. 224, Tr.381:14-385:11; App. 403, Ex. 34) (See Figures 1, 2 & 3 below).



PLAINTIFF'S
EXHIBIT
46

Figure 1
Assumption Visitors Dugout & Home plate-App.430, Ex.46.



PLAINTIFF'S
EXHIBIT
48

Figure 2
Assumption Visitors Dugout-South Doorway- App. 432, Ex. 48



Figure 3

Assumption Visitors Dugout-View from home plate into North doorway-
App. 433, Ex. 49.

At trial, Coach Argo admitted that he was responsible for the safety of the baseball facility, and that it was never acceptable to expose his, or visiting players to preventable injury. (App. 244, Tr. 411:5-412:24).

Three baseball coaches and expert witness Scott Burton testified that the proximity and location of the Assumption visitor's dugout created a uniquely hazardous situation for inhabitants of the dugout during games. (App. 213, Tr. 287:9-289:17; App. 227, Tr.344:5-347:2; App. 301, Tr. 657:18-660:4; App. 430, Ex. 46; App. 431, Ex. 47; App. 432, Ex. 48 & App. 433, Ex. 49; App. 238, Tr. 386:17-387:1). The visitors' dugout was located

along the first baseline where most right-handed batters hit foul balls if they swung late at a pitch. The unprotected north door was approximately forty-five feet from home plate, and the south door was approximately sixty feet from home plate. (App. 228, Tr. 345:11-345:22). (See Figure 1 and Figure 3). So a hard-hit, line drive foul would hit or enter the visitors' dugout in less than half a second. (App. 228, Tr. 346:2-346:8; App. 301 Tr. 659:6-659:22). At trial, Assumption admitted that the purpose of their visitors' dugout was to house and protect visiting players from foul balls, thrown bats and overthrown balls while they were not on the field of play. (App. 252, Tr. 451:21-452:11). Assumption also admitted that Spencer Ludman was required to stand in their visitors' dugout during the game if his team was on offense and he was not batting or on deck. (App. 275, Tr. 553:7-555:15; App. 431, Ex. 47).

Before plaintiff's injury, Coach William Argo and, Athletic Director Wade King admitted that they had seen foul balls hit, and even enter the visitors' dugout at Assumption, yet the school failed to gate or close the two open doorways before July 7, 2011 when Ludman suffered a skull fracture and permanent brain injury. (App. 245, Tr. 424:20-425:20; App. 265, Tr. 514:16-515:1).

The foul ball hazard created by the Assumption visitor's dugout was so evident before plaintiff's injury that Muscatine Head Baseball Coach Robert Leech implemented a special rule when Muscatine played Assumption to keep coaches and players away from the foul hazard at the north door. (App. 245, Tr. 657:24-659:5; App. 433, Ex. 49; See Figure 3). Muscatine coaches considered Assumption's dugout small and cramped when they tried to fit the players, coaches and their gear into the remaining space (leaving the north end vacant per Coach Leech) while on offense. (App. 301, Tr. 660:1-661:10; App. 230, Tr. 353:22-354:2; App. 275, Tr. 553:15-554:5). Coach Leech believed the foul ball hazard serious enough to forbid his players to sit or stand near the north door because it was so close to the plate. (App. 301, Tr. 657:24-658:9). Photographic and testimonial evidence demonstrated that a line drive foul ball hit into the north end of the dugout from home plate could directly strike players sitting on the bench behind what protective fence existed. (App. 213, Tr. 287:9-289:17; App. 227, Tr. 344:5-347:2; App. 301, Tr. 657:18-660:4; App. 430, Ex. 46; App. Ex. 48 & App. 433, Ex. 49). The proximity and placement of the open doorways created the risk of virtually any player in the dugout getting hit by a foul ball, either directly or indirectly (by a ricochet as the ball bounced off the structure or bench). At trial, there was no dispute that a player or coach

in the visitors' dugout could be hit (either directly or indirectly) by a foul ball even if they were positioned behind the protective fence. (App. 213, Tr. 287:9-289:17; App. 227, Tr. 344:5-347:2; App. 301, Tr. 657:18-660:4; App. 430, Ex. 46, App. 432, Ex. 48 & App. 333, Ex. 49).

During games, Coach Leech would position himself approximately five feet from the north end of the bench inside the visitors' dugout, so he could see the game and coach his players, but he did not allow any of his players to sit to his left because of the foul hazard due to the open north doorway. (App. 301, Tr. 657:24-658:25; App. 433, Ex. 49). This procedure effectively reduced the amount of usable space for standing or sitting in the dugout. (App. 301, Tr. 660:1-660:23). Coach Leech created no special rule against standing in or near the south doorway due in part to the fact that at least it was a little further from the plate and the players had to use one of the two doorways to emerge when batting, while on offense. (App. 306, Tr. 678:12-679:4; App. 214, Tr. 289:6-289:17; App. 230, Tr. 353:22-354:14).

Assumption had no rules about where to stand inside the visitors' dugout. Assumption posted no signs or warnings about standing anywhere in the visitors' dugout. (App. 230, Tr. 353:22-354:14).

In the years before plaintiff's injury, Coach Argo had initiated and overseen a number of improvements and safety modifications to the baseball

facility, including the installation of protective tubing on the top of the chain link fence, and reversing the outfield fence to make sure the posts were on the outside. (App. 244, Tr. 410:17-411:4). Yet no effort was made to deal with the open doorways of the visitor's dugout. (App. 246, Tr. 425:21-434:4).

In the spring of 2011, Coach Argo oversaw improvements to the visitors' dugout, including the installation of a concrete floor, and the erection of chain link fence from field level to the top of the dugout in the center 25 feet of the side facing the field. (App. 246, Tr. 425:21-434:4). Unfortunately, the new, protective fencing installed in the spring of 2011 still left the two 5 foot by 7 foot doorways completely open and unprotected. (App. 246, Tr. 425:21-434:4; App. 248, Tr. 433:25-434:4).

At trial, Plaintiff introduced testimony from Scott Burton, an expert in recreational facility safety. (App. 234, Tr. 370-404). Burton testified that, in 2000, the American Society for Testing and Materials (ASTM) promulgated F 2000, which refers to fencing of baseball and softball dugouts. (App. 397, Ex. 31). Section 6.6 of the standard refers to protective fencing for sub grade dugouts and recommends "*the protective fencing should cover the entire opening from ground level to top of the dugout roof or overhang*". (App. 397, Ex. 31; App. 239, Tr.391:9 -16). The ASTM standard was

available to the public online for a minimal fee. (App. 235, Tr.374:12-376:18; App. 238, Tr. 387:2-391:25).

Coach Argo admitted that when Assumption made improvements to the visitors' dugout in the spring of 2011, Assumption management did not do any research regarding dugout safety or design, nor did it hire any consultant to advise them. He did not go online and look for any recommendations or safety standards. (App. 245, Tr. 421:15-422:25).

Coach Argo admitted that he had seen foul balls enter the visitors' dugout and actually hit visiting players before Ludmans injury. He testified:

Q. Have you ever seen gates like we just showed in Exhibit B that actually have a spring closer?

A. I'm not sure if I know what that is.

Q. They actually have a spring closer to make --its neutral position is actually closed. Have you ever seen one of those?

A. I don't know that I have.

Q. Before Spencer got hit on July 7, 2011, other people in the visitor's dugout got hit with foul balls. Is that what you said?

A. Yes.

Q. But fortunately they weren't seriously injured.

A. Yes.

Q. And obviously you took no -- did you take any greater precautions in the visitor's dugout after those people got hit, even if it wasn't a serious injury?

A. No, I did not.

Q. If there were gates on both doors of the visitor's dugout and the gates were closed during play, do you think the gates would pose any greater hazard than the fence?

A. They would be the same as the fence.

Q. The advantage they would give is that then no balls could enter the visitor's dugout. Fair?

A. Yes.

Q. And if anybody threw a bat, either intentionally or unintentionally, that would stay out of the dugout, wouldn't it?

A. Yes.

Q. If an overthrown pitch was made – strike that. If an overthrow from a baseman went past the foul line, that would stay out of the dugout?

A. Yes.

Q. If the gates were on the doors and the doors were closed, the gates were closed, I want you to assume that someone overthrew in the infield and it went towards the dugout. Do you think that would prevent that ball from going in?

A. I would think that it would if the gates were closed. Yes. (App. 260, Tr. 484:12-486:6).

It is undisputed that the Iowa High School Athletic Association (IHSAA) has never promulgated any standards, rules, or even recommendations concerning dugout design or safety. (App. 267, Tr. 523:23-525:15; App. 453, Ex. D). The only rule that even mentions dugouts is the recommended layout of the field that recommends that dugouts be at

least sixty feet outside the first and third base lines. Each school is left to design and maintain its own baseball dugouts to provide reasonable protection to players from foul balls, thrown or broken bats, or overthrown balls. (App.322, Tr.755:7-757:1; App. 453, Ex. D).

On July 7, 2011 Spencer Ludman was playing second base on the varsity baseball team for Muscatine. (App. 274, Tr. 551:24-552:6). In the fifth inning, Ludman was on offense, in Assumptions visitors' dugout with the other players and coaches. Plaintiff thought he might have to bat, so he went to the south door area of the dugout. When it became unlikely that he would get to bat, he grabbed his glove and regular hat to retake the field. He looked out at the field of play standing next to his teammate, Grant McConnaughey, cheering for the batter, Brooks Wagner. It is undisputed that Ludman was inside the confines of the dugout, in or near the south doorway, with his foot on the step, still inside the dugout when he was hit by the foul ball. (App. 274, Tr. 552:20-555:15). The only testimony concerning the availability of an alternative place to stand or sit immediately before the injury was provided by Ludman himself. He testified that after he removed his batting helmet, replaced it with his regular hat and turned to watch the game, he looked around and there was nowhere else to stand. (App. 275, Tr. 553:15-554:5).

The Assumption pitcher threw a fastball to Brooks Wagner, who swung late and sent a line-drive foul ball at high speed into the south doorway of the visitors' dugout. Because he was facing the field of play and watching the game, Ludman picked up the inbound foul out of the side of his vision a split second before impact and started to turn his head and raise his hand to protect himself. (App. 230, Tr. 356:11-358:19; App. 249, Tr.439:4-441:11; App. 330, Tr. 787:17-793:19). Witnesses all describe the flight time from the time the ball hit the bat until it hit Spencer Ludman as a split second. (App. 230, Tr. 356:11-358:19; App.249, Tr. 439:4-441:11; App. 330, Tr. 787:17-793:19). Coach Argo saw Spencer try to bring his hand up to "defend himself".

Q. Tell me what you can recall from your vantage point what happened.

A. The batter for Muscatine was a right-handed batter. The pitch was made, so I followed the pitch and then I followed the ball, the flight of the ball off the bat into the far opening of the visitor's dugout. I didn't know at the time who the player was, **but I saw a player react to the ball, try to defend himself from the ball, and I heard a sound.** I didn't know if it hit his arm or hit his head. I wasn't sure. (App. 249, Tr.439:14-24) (Emphasis mine).

Assumption is in the Mississippi Athletic Conference (MAC) with ten members. (App. 256, Tr. 466:23-467:14). The conference has no rules, recommendations, customs or even common practices with respect to

fencing the dugouts (or any other method) for safety from foul balls.

Defendants own retained expert, Greg Goweey testified:

Q. We can agree that the High School Athletic Association rules are silent about the design of dugouts, correct?

A. Correct.

Q. And we can agree that the International Building Association codes are silent on how to build a safe dugout, correct?

A. Correct.

Q. So by default, would it be fair to say that it's up to the owner of the property to build a safe dugout with your help if they hire you?

A. Correct.

Q. Okay. Mr. Goweey, were you aware that Coach Argo testified under oath that he watched foul balls hit that dugout over the years before Spencer got hurt?

A. I am not aware of that.
(App. 322, Tr. 755:7-22).

When defendant made its offer of proof of other dugout designs and configurations in the conference, Assumption failed to provide any evidence of any uniform custom or standard of the doorways and fencing of any of the dugouts of the members of the MAC conference. In fact, Witness Goweey made this stark and candid admission.

Q. What general observations do you have about the dugouts in the MAC?

A. They're all designed differently. (App. 317, Tr. 734:11-13).

Assumptions retained expert, Mr. Gowey compared the fencing, and doorway openings of the dugouts of Davenport Central, Davenport North, Davenport West, Muscatine High School, Pleasant Valley, North Scott, Clinton, Burlington High School, Bettendorf with Assumption and confirmed that all were different. (App. 317, Tr. 734:17-740:20). Some had different doorways, some had full fencing and some did not. Assumption failed to produce any foundation of the proximity and angle of any of the other dugouts from home plate. They proffered no evidence that the danger of foul balls entering the other MAC Conference dugouts was substantially similar to that of Assumption. (App. 317, Tr. 734:17-740:20).

Assumption baseball coach Argo frankly admitted he never even thought of fencing or gating the north and south doors for better foul protection until after Spencer Ludman was injured. (App. 317, Tr. 425:21-434:4; Especially App. 248, Tr. 433:25-434:4). Questioned by Assumptions own counsel, Coach Argo testified that Assumption had taken no remedial measures since the Ludman injury. He testified that the school officials had reviewed the matter and decided that, despite the history of foul balls entering the dugout through the open doors of the visitor's dugout, they concluded it still afforded reasonable protection to coaches and players during games. (App. 259, Tr. 476:19-477:2). On redirect by Ludmans

attorney, Coach Argo admitted that he would only rethink the protection afforded by the visitors' dugout if a visiting player was actually killed by a foul ball. (Emphasis Mine.) (App. 261, Tr. 488:6-489:4).

In the fifth inning, Ludman went to the "south doorway" to emerge "on deck" if Brooks Wagner got a hit. (App. 275, Tr. 552:20-558:11). He testified as follows:

Q. Tell the jury, please, where you were and what you were doing when you got hit.

A. Um, I was on the far end of the dugout. We've been referring to it as the second opening, I believe, and I had my right foot on the one step in between the ground level and the field level and my left foot on the ground, and I had just gotten to that position. Before that, I was in the hole. I was the second batter in the order, and I saw that Brooks had two strikes on him. He was not a very good hitter, and I didn't think that there was any way that he was gonna reach base safely, so I grabbed my glove and my hat and I put my hat on. I hadn't put my glove on yet, and then I looked to my left and there was nowhere for me to go, so I just put my foot up there on that step, and that's when I got hit. (App. 275, Tr. 553:15-554:5).

Assumption produced no evidence that Ludman had any alternative to sit or stand in the crowded visitors' dugout that would have provided him a safe refuge from foul balls entering either doorway.

At the close of evidence, plaintiff's counsel made a timely motion for directed verdict on all allegations of comparative fault, including unreasonable failure to avoid risk. (App. 345, Tr. 886:8-893:15). Counsel

pointed out that defendant had failed to prove that, at the time, Ludman had any alternative place available to remain in the dugout (as required) that was protected from foul balls. The District Court granted the motion for directed verdict as to the issue of removal of the batting helmet. (App. 347, Tr. 893:16-893:24). The court then denied plaintiff's motion for directed verdict concerning both liability and causation on the affirmative defense based upon standing in or near the South doorway. (App. 347, Tr. 893:25-894:9). As to the lookout allegation, the District Court correctly concluded that "the direct evidence of everyone was that he was facing the field. He was watching the game. He was encouraging or whatever." (App. Tr. 894:10-895:3).

The line drive foul hit Ludman on the left side of his head, fracturing his skull. (App. 630, Ex. 2; App. 638, Ex. 3-01 thru 3-187). Plaintiff had to be rushed by ambulance to Genesis Medical Center where his parents were advised that he had suffered a life-threatening brain injury and he needed to go to University of Iowa Hospitals and Clinics (UIHC) for treatment. (App. 616, Ex.1; App. 630, Ex. 2-1 thru 2-8; App. 638, Ex. 3-1 thru 3-187; App. 308, Tr. 699:12-704:5).

Plaintiff was hospitalized at University of Iowa Hospitals and Clinics from July 7, 2011 through July 18, 2011 before being released home.

Ludman's brain bleed was treated with dehydration therapy. He was unable to communicate. Spencer Ludman had to learn to walk and talk all over again, and spent months in rehabilitative therapy. (App. 825, Ex. 6; App. 1207, Ex. 7; App. 1275, Ex. 12; App. 1318, Ex. 13). Plaintiff, Spencer Ludman had been doing reasonably well in his recovery when, suddenly, he began having grand mal seizures in March of 2012. (App. 1215, Ex. 8; App. 374, Ex. 19; App. 390, Ex. 23) The seizure's terrified Ludman so badly that he developed post traumatic stress disorder with attendant depression, confusion and serious behavioral disorders. (App. 359, Ex. 18; App. 312, Tr. 710:25-722:20; App. 390, Ex. 23, page 26 line 21- page 27 line 13). At the time of trial, plaintiff continued to undergo supportive counseling therapy to deal with depression, anger and behavioral disorders. (App. 374, Ex. 19; App. 1255, Ex. 10; App 1207, Ex. 7) Spencer Ludman must take 2000 mg of anti-seizure medication called Kepra everyday to control his seizures. (See App. 390, Ex. 23 page 20 line 5- page 25 line 12.) Plaintiffs treating neurologist, Dr. Birski, testified in her deposition that the seizures are caused by permanent scarring on the brain due to the injury. (App. 390, Ex. 23 page 16 line 2- page 19 line 18). She testified that she expected plaintiff will need to take anti-seizure medication for the rest of his life. (See App. 390, Ex. 23 page 22 line 24- page 24 line 22). Plaintiff's past medical

expenses were submitted to the jury as gross charges of \$150,355.10, with \$55,039.39 paid by Blue Cross Blue Shield. (See App. 1347, Ex.16). Plaintiff also submitted evidence of substantial amounts of future costs for medicine and regular examinations for seizures amounting to several hundred thousand dollars. The jury returned a unanimous verdict finding negligence and causation, against Assumption and itemizing damages totaling \$1,500,000. With the agreement of the parties, the District Court corrected the claimed past medical expenses from \$80,000 to the amount actually paid by Blue Cross Blue Shield (\$55,039.30). But the jury also found that Spencer Ludman had been negligent for unreasonably failing to avoid injury by standing in or near the south doorway. They allocated 30% fault to the plaintiff and 70% fault to the defendant.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED ASSUMPTIONS MOTION FOR DIRECTED VERDICT ON THE CLAIM OF NO DUTY-PLAINTIFFS PROVED CONCLUSIVELY THAT THERE IS NO INHERENT RISK OF BEING STRUCK BY A FOUL BALL WHEN A BASEBALL PLAYER IS STANDING INSIDE A DUGOUT CONSTRUCTED AND MAINTAINED WITH DUE CARE.

A. Preservation of Error.

Plaintiff/Appellee agrees that Assumption preserved the issue of whether or not Assumption owed Spencer Ludman a duty of due care in maintaining its visitors' dugout.

B. Standard and Scope of Review

Plaintiff/Appellee agrees that the standard and scope of review cited by defendant-appellant is correct.

C. Discussion

- 1. The District Court correctly ruled that the “limited duty” analysis urged by the defendant had no application to the facts of this case. Foul balls, overthrown balls, and thrown bats pose no risk whatsoever to any player or coach standing or sitting in a dugout constructed and maintained with reasonable care.**

The District Court's refusal to grant Assumption's motion for directed verdict based on the application of the “inherent risk” doctrine was correct. At the time he was hit by a foul ball, Ludman was not playing the game of baseball. Rather, he was standing in a portion of the facility (the visitors' dugout) designed, constructed and maintained solely by Assumption for the protection of visiting players during the game when they were not on the field. Unlike a spectator, Ludman had a very limited choice of places where he could sit or stand relative to home plate during the game. He had to be in the dugout if he was not on the field of play.

Assumptions argument deftly avoids the most important legal and public policy implications of the defendants appeal. The key question of significance to Iowa High School baseball players, their families and coaches is simply stated. Where an owner/occupier of a baseball facility can, by simple measures completely protect players and coaches from all foul balls, overthrows, and thrown bats, in a place they must occupy during the game, and where they are relatively close to the hazards, will this Court eliminate any responsibility to do so under the guise of limited duty? Questions of negligence or proximate cause are ordinarily for the jury. Thompson v. Kaczinski 774, N.W. 2nd 829 (Iowa 2009) at 832. In Thompson, the Iowa Supreme Court provided an extensive analysis of the common law notion of duty between citizens to protect each other from causing each other harm. **“Common Law Duty.** An actionable claim of negligence requires the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages.” See Thompson, Supra at 834 (Other citations omitted).

In this case, the District Court held that Assumption owed Ludman the same duty of reasonable care in the construction and maintenance of their baseball facility as they do to persons who visit their school, or any other portion of their real property.

Also at page 834, the Thompson court discussed three factors which should be considered in determining whether a duty to exercise reasonable care exists, which are 1) the relationship between the parties, 2) reasonable foreseeability of harm to the person who was injured, and 3) public policy considerations. (Citations omitted).

Spencer Ludman was a high school baseball player for Muscatine. He was visiting the Assumption field. He was expected to stand or sit inside the Assumption dugout whenever he was not actively playing baseball or waiting to bat on deck, wearing a batting helmet. Spencer Ludman was unlike a spectator who could choose to sit anywhere in the park. Ludman had no control over the visitor's dugout.

At the time of Ludmans injury, he was following the instructions of his coach and the rules and customs for players in the dugout who might be called upon to emerge on deck, or retake the field. Ludman moved to the south doorway precisely because, while he was still in the dugout, he might be called upon to leave the dugout and emerge on deck. When that became unlikely, he replaced the batting helmet with his regular cap and with nowhere else to stand remained at the South end of the visitor's dugout next to his teammate Grant McConnaughey.

With respect to the second element, plaintiff produced undisputed evidence of the foreseeability of harm to Spencer Ludman from foul balls generated by right handed batters. Plaintiff also produced undisputed evidence that the Assumption dugout was especially dangerous, in that it was extremely close to home plate, and in the primary foul ball zone for right handed batters. Last but not least, plaintiff proved the Assumption Coach Argo had actually seen foul balls hit players in the Assumption dugout before Spencer Ludman suffered his fractured skull.

The third element discussed in Thompson is public policy considerations. Plaintiff submits that all public policy considerations illustrated by this case support the affirmance of the District Court's ruling on the duty owed by Assumption to Mr. Ludman. High school baseball players range in age from fourteen to eighteen. During a game, they are expected to be in the dugout if they are on offense, but not batting or on deck. At trial, defendant admitted that players and coaches in the dugout are not expected to keep the same level of constant attention to the game as when they are actively on the field in play. It makes absolutely no sense to require owners and occupiers of land to employ reasonable care to protect lawful visitors from harm, and then carve out an exception for failure to

protect the player when he or she is standing inside a structure designed to protect them.

There are no public policy considerations supporting defendant's argument. Precautions which would completely eliminate the risk of players in the dugout being hit by foul balls, over throws, and thrown or broken bats is accomplished with simple, inexpensive fencing.

Parents are more likely to allow their children to participate in high school sports if they know that at least, when they are in the dugout, they are protected from missiles generated by players on the field.

The game of baseball will not be affected by this case in any fashion. The "rough and tumble" of baseball will be unaffected by improvements in safety of dugouts.

The instant case demonstrates the wisdom of the District Court's ruling rejecting the "limited duty" urged by the defendant. Assumption has sole control over the dugout that it provides for visiting players. Despite actual knowledge of the hazard posed by the visitor's dugout, Assumption chose to fence only portions of the dugout facing the field of play and to leave two 5x7 foot doorways open to incoming balls or bats.

Plaintiff proved conclusively that there is no risk if the owner of the facility simply exercises reasonable care to protect players and coaches from

that risk while in the owner's dugout. If there is no inherent risk which must be assumed by any player or coach who wants to participate in the sport, then the limited duty doctrine has no application.

As early as 1974, the Iowa Supreme Court confirmed that the owner/operator of a baseball facility owed a duty of reasonable care to players of athletic contests when the case involved a charge of negligence in connection with the facility itself.

“What the law regards as unreasonable risk of harm to players is somewhat unique in athletic contests, since risks naturally attend such events....Most injuries in athletic contests result from the rough and tumble of the game itself. Where, however, a player does introduce substantial proof of want of due care by the sponsor, the player generates a jury issue on negligence. The negligence may take various forms. Thus, in one case a college located a flagpole within the playing field itself. An outfielder, in his excitement and concentration, forgot about the pole and ran into it while chasing a fly. **The Court thought the jury could reasonably find the location of the pole subjected players to unreasonable risk.**” *Dudley v. William Penn College* 219, N.W. 2d. 484, Iowa 1974 at 486.
(Emphasis mine)

The Court in *Dudley*, clearly recognized the duty of the owner of a sports facility had a duty to maintain the facility with reasonable care to avoid injury to participants from characteristics of the facility, even if they were on the field and playing the game.

Ten years after *Dudley*, the Iowa Legislature passed Chapter 668, the Comparative Fault Act. The Act (Section 668.1) defines “fault” as one or

more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others. The legislature repealed the common law concept of contributory fault as a complete bar to recovery and replaced it with comparative fault to allow juries to determine fault and the causal contribution of each parties fault. Applying the “limited duty” doctrine to the facts and circumstances of this case rejects the legislative intent to allow juries to decide when a party has failed its duty of reasonable care to prevent unnecessary injury by due care.

As a provider of a high school baseball facility, defendant Assumption now attempts to invoke the doctrine of limited duty as a means to eliminate the same duty of due care that is imposed on all other owner/occupiers of land in the State of Iowa. See Koenig v. Koenig 766 N.W. 2d. 635 (Iowa 2009). The logical and legal basis for defendant’s requested immunity-that foul balls can cause injury and even death, is precisely the hazard which the owner’s facility (the dugout) is supposed to protect against when players are not playing the game. Defendant’s position is an exercise in circular and convoluted logic, as well as a patent misapplication of a doctrine which, has not met with widespread application in the State of Iowa.

Also absent from defendants brief, is the language from Sweeney v. City of Bettendorf 762, N.W. 2d. 873 (Iowa 2009) directly applicable to the instant case.

“Regardless of whether the approach is characterized as involving inherent risk of a limited duty, courts apply the doctrine have held that the owner or operator of a baseball stadium is not liable for injury to spectators from flying bats and balls **if the owner or operator provided screened seating sufficient for spectators who may be reasonably anticipated to desire such protection and if the most dangerous areas of the stands, ordinarily the area behind home plate, were so protected.**” Sweeney at 881. (Emphasis mine)

The “screening” of the Assumption visitors’ dugout had not one, but two thirty-five square foot openings, and unprotected doorways, situated at an angle from home plate that put all occupants in danger of getting hit. (App. 430, Ex. 46; App. 433, Ex. 49) The flight time of a foul ball traveling eighty miles per hour into either of the visitors’ dugout doorways was approximately half a second. Assumption put players and coaches in harm’s way without sufficient time to avoid injury.

Indeed, Assumptions own brief cites language which should exclude the application of the doctrine to these circumstances. Citing Nichols v. Westfield Industries. Ltd. 380 N.W. 2d. 392, 399 (Iowa 1985) at page thirty of Assumption’s brief we find the following quote:

“(The limited duty rule) is an alternative expression for the proposition that defendant was not negligent, i.e. either owed no duty or did not breach the duty owed. It is based on the concept that **a plaintiff may not complain of risks that inhere in a situation despite proper discharge of duty by defendant.**”

The application of the inherent risk doctrine requires that the hazard which injured plaintiff (getting hit with a foul ball in the dugout) was inherent and unavoidable, even with due care on the part of the defendant. (Emphasis mine). In other words, due care in the case at bar required that Assumption consider the risk associated with foul balls entering the visitors’ dugout and take reasonable measures to prevent it. Clearly, after listening to the witnesses and viewing the evidence, the jury found that Assumption had not exercised reasonable care in maintaining the visitors’ dugout, and that its breach of duty was a cause of Ludman’s head injury.

Defendants reference to Feld v. Borkowski 790 N.W. 2d, 72, (Iowa 2010) is peculiar in light of the fact that Feld involved an injury that occurred from a thrown bat which struck a first basemen on the field of play, not while the plaintiff was in the dugout. The Court ruled that although softball was a contact sport, the plaintiff had presented enough evidence to generate a jury question on the higher standard of care required (See Feld, at 79-80.)

Assumption spends an inordinate amount of its brief asserting that a) foul balls occur during the game of baseball, and b) Spencer Ludman was aware of that fact. These facts have never been in dispute. But just as all drivers on Iowa roads know that motor vehicle collisions can occur, this does not excuse drivers from reasonable care to avoid injury to others.

This is precisely Assumptions argument when it attempts to equate the danger of being hit with a foul ball while playing the game, with the risk while occupying the dugout specifically intended to protect the player from the foul ball. Our civil justice system imposes the duty of reasonable care on every person to protect citizens from preventable injuries and to compensate those whose injuries could and should have been prevented by reasonable care. High Schools like Assumption reap the benefits of participation in high school sports. These same schools have a responsibility to use reasonable care to protect students on their property, and prevent injuries which can be prevented by due care.

Extending the inherent risk doctrine to immunize even the worst, most careless failure of dugout protection under the guise of “assumption of risk” shifts the burden of preventable injuries in dugouts from foul balls, overthrows and flying bats to high school players and their families. Indeed, such a rule could well discourage participation in high school sports as

parents decide that forcing their children to sit in an unprotected or poorly protected dugout close to the home plate is not worth the risk. Players on the field (except for the protected catcher) have more distance and time to avoid being hit by a foul ball, overthrow, or errant bat.

Regardless of age, the fastest and most observant high school athlete does not have enough time to protect himself from an 80 mph line drive foul ball if the dugout is too close and lacks simple fencing.

2. Assumption may not invoke the “inherent risk” or “limited duty” doctrine in this case as plaintiff proved that Assumption created a higher risk of being hit by a foul ball in its visitor’s dugout, and outside the range of risks that flow from participation in this sport.

In the instant case, plaintiffs proved Assumption acted in an unreasonable manner which increased, and indeed, created a higher risk of being hit by a foul ball in its visitors’ dugout, outside the range of risks that flow from participation in the sport. Thus, even if applicable, the “limited duty” doctrine should not be available to the defendant. *Feld v. Borkowski*, 790 N.W. 2d. 72, 87 (Iowa 2010).

Evidence showed that Assumption maintained a cramped sub grade, visitors’ dugout in the most common foul zone, only fifty feet from home plate, with two, thirty-five square foot open doorways. Defendant knew that foul balls regularly entered the dugout and hit players before Ludman’s

injury. The angle and distance between home plate and both doorways (north and south) created a situation where anyone sitting or standing virtually anywhere in the dugout could get hit a “split second” after the ball was hit. Assumption knew that visiting players and coaches were required to stand or sit inside the visitors’ dugout during the game. Muscatine coaches testified that the Assumption dugout was uniquely dangerous due to its proximity to home plate, and location relative to right-handed batters.

Players on the field (with the exceptions of the catcher and batter—who are protected with special equipment) are standing in the open, not in a crowded enclosure. Most are more than fifty feet from home plate giving them more time to see a ball or flying bat. Players on the field are expected to watch the ball or bat whenever a player is batting. Players and coaches in the dugout are not expected to have full attention on the batter at all times. Hence the risk of being struck by a ball on the field of play when engaged in the actual game is less likely than when occupying the dugout, and so Assumption created a higher risk of being hit by a foul ball in its visitor’s dugout which was outside the normal range of risk from participation in the sport. The location and proximity of the visitor’s dugout at Assumption coupled with two open and unprotected doorways put visiting players and

their coaches in a veritable shooting gallery, with limited visibility, attention and opportunity to avoid an incoming ball.

II. PLAINTIFF, SPENCER LUDMAN PRESENTED AMPLE EVIDENCE TO GIVE RISE TO A JURY QUESTION CONCERNING ASSUMPTIONS NEGLIGENCE.

A. Preservation of Error.

Plaintiff/Appellee agrees that Assumption preserved the issue of whether or not plaintiff presented sufficient evidence to support the verdict for appeal.

B. Standard and Scope of Review.

Plaintiff/Appellee agrees that the standard and scope of review cited by defendant/appellant is applicable.

C. Discussion.

1. Before Ludman's injury, Assumption had actual knowledge of the increased hazard of foul balls entering the visitors' dugout.

Before submitting the case to the jury, the District court provided the appropriate instruction for owners and occupiers of land such as Assumption based on Koenig v. Koenig, 766 NW 2nd 635 (Iowa 2009). The District Court properly instructed the jury that they should consider the following factors in evaluating whether Assumption had exercised reasonable care for the protection of lawful visitors such as Spencer Ludman:

- 1.) The foreseeability or possibility of harm;

- 2.) The purpose for which the visitor entered the premises;
- 3.) The time, manner and circumstances under which the visitor entered the premises;
- 4.) The use to which the premises are put or expected to be put;
- 5.) The reasonableness of the inspection, repair or warning;
- 6.) The opportunity and ease of repair or correction or giving of the warning;
- 7.) The burden on the land occupier and or community in terms of inconvenience or cost in providing adequate protection;
- 8.) Any other factors shown by the evidence bearing on this question.

As already established in this brief, the plaintiff produced a substantial amount of evidence of the foreseeability of harm in the dugout from foul balls. Ludman clearly came to the Assumption ball park and visitor's dugout with the lawful purpose of playing high school baseball.

There is no dispute that the dugout was specifically designed and maintained by Assumption. Its purpose was to shelter and protect players and coaches who were not on the active field of play, but who were close to the plate and the hazard of foul balls.

Plaintiff presented an expert witness who admitted a ten year old standard which recommended fencing of the dugout. That same expert

identified the standard as being applicable. He also suggested other potential feasible and inexpensive alternatives to completely eliminate the hazard of being hit inside the dugout.

Assumption's Coach Argo admitted that he had seen foul balls enter the visitor's dugout and hit visiting players during games before Ludman's injury. Yet, Assumption took no steps to eliminate the hazard before plaintiff was hit with enough force to cause serious permanent injury.

The testimony at trial proved conclusively that gating the doorways, offset entrances with full fencing, entrance barriers or even moving the dugout further from home plate would have eliminated the danger.

Plaintiff's proposed safety modifications were obvious, feasible and relatively inexpensive. Ironically, three of the "other" MAC dugouts had the same full protection urged by the plaintiff for the Assumption dugout.

There was absolutely no question that the baseball which struck Ludman's head caused a skull fracture and permanent scar tissue on his brain. After hospitalization, months of therapy and years of counseling, plaintiff continues to require daily doses of seizure medication and regular physician follow up.

2. Plaintiff's undisputed evidence demonstrated that Assumption could and should have totally eliminated the risk of being struck inside the dugout with simple reasonable care.

Plaintiff proved that Assumption was not only well aware of the hazard created by its visitor's dugout, but it had a number of simple, inexpensive steps which were available to completely eliminate the hazard. The simplest, cheapest and most effective solution was simply putting gates on the two open doorways which should have been closed when any player was batting. Although Assumption tried to argue that that might create some kind of enhanced hazard, cross examination demonstrated that Assumption actually had the same type of gate immediately adjacent to the Assumption dugout.

Plaintiff also proved that other options could have been fencing the entire dugout and moving a protective doorway to the South end, the installation of L shaped barriers for each door, or moving the visitor's dugout further from the immediate zone of danger.

Despite Assumptions actual knowledge of the hazard of foul balls from right handed batters entering the Assumption dugout at high speed, it failed to take any reasonable, simple or inexpensive steps to eliminate the hazard. Even after plaintiff's injury, Assumption's representatives testified that they refused to take any remedial measures to close or guard the doorways unless the next victim died.

III. THE DISTRICT COURT PROPERLY EXCLUDED THE PROFFERED EVIDENCE OF “OTHER DUGOUTS” AS DEFENDANT ADMITTED THERE WAS NO STANDARD OR CUSTOM APPLICABLE TO ASSUMPTION’S DUGOUT, AND ANY RELEVANCE WAS OUTWEIGHED BY UNFAIR PREJUDICE, CONFUSION, AND LACK OF FOUNDATION.

A. Preservation of Error

Plaintiff Appellee agrees that Assumption preserved the alleged error sufficient to raise the issue on appeal.

B. Standard and Scope of Review

Plaintiff’s generally agree that appellate courts in Iowa review evidentiary rulings made by the trial court for an abuse of discretion which exists only when the District Court rules on “grounds or for reasons clearly untenable or to an extent clearly unreasonable”. Heinz v. Heinz, 653 NW 2nd 334, 338 (Iowa 2002) and Graber v. City of Ankeny, 616 NW 2nd 663, 638 (Iowa 2000). Plaintiff also agrees that defendant- Appellant must show not only an abuse of discretion, but that the ruling resulted in prejudice to the complaining party. Horak v. Argosy Gaming Company 648 NW 2nd 137, 149 (Iowa 2002).

C. Discussion

- 1. Defendant Appellant failed to establish any relevant custom or practice existed among the “other dugouts” and even admitted they were all “designed differently”.**

Defendant Appellant's allegation of error associated with the court's ruling on defendant's proffered evidence of "other dugouts" in the MAC has no merit. Defendants own expert witness (Mr. Gowey) admitted that there was no common custom or standard practice in the design and construction of the other dugouts allegedly offered for that purpose.

During the offer of proof, out of the presence of the jury, defendant's expert, Architect Greg Gowey testified as follows:

Q. Mr. Gowey, can you very briefly tell the Court what your profession is?

A. I'm an architect.

Q. Have you had occasion to visit other baseball fields in the Mississippi MAC conference?

A. Yes, I have.

Q. How is it that you've had occasion to visit these other fields?

A. I had two sons that played baseball for Davenport Central.

Q. How many times would they have played at all these schools?

A. Each of my kids would have played there four times in high school, so eight, eight games. Excuse me.

Q. What general observations do you have about the dugouts in the MAC?

A. They're all designed differently. (Emphasis Mine). (App. 317, Tr. 733:21-734:13).

Then, after Gowey's candid admission, defendant, with the help of Exhibit C-multiple photographs of the proffered "other dugouts" clearly demonstrates the absence of any custom or practice consistent in the design and layout of the proffered evidence.

Despite the rhetoric in defendants brief, simple visual examination of Exhibit C demonstrates crucial differences between the "other dugouts" and the Assumption dugout.

Contrary to the arguments made by Defendant/Appellant, visual comparison of Figures 1,2 and 3 in this brief and Defendants Exhibit C (the other dugout photographs) corroborate Mr. Gowey's comment that "there all designed differently".

Davenport Central's dugouts are clearly much further from the plate than Assumptions. Furthermore, the dugout appears much larger (although we are left to wonder) and it is level with the field instead of being sub grade. (App. 439, Ex. C.)

Davenport North High School's dugout's include one that is fully fenced and completely protected from foul balls, exactly as plaintiff urged in the instant case. (App. 439, Ex. C pg. AHS0085.) Davenport North's dugouts are not even identical and are clearly much further from the home plate than Assumption. (App. 439, Ex. C pg. AHS0086.)

Davenport West High School's dugouts are much further from home plate than Assumption. Both are level with the playing field and much larger than Assumption. (App. 439, Ex. C pgs AHS0087 and AHS0088)

Muscatine's "Tom Bruner" Field has dugouts that are level with the playing field and much farther from home plate than the visitor's dugout at Assumption. (App. 439, Ex. C pgs AHS0091 and AHS0092)

Pleasant Valley's dugouts are level with the playing field and fully fenced to protect players. (App. 439, Ex. C pgs. AHS0092 and AHS0093) Notably, Pleasant Valley's dugout appears to have a gate on the dugout which is the closest to home plate, comparable or similar to what the plaintiff proposed in this litigation. (App. 439, Ex. C pg. AHS0093) Pleasant Valley's dugouts are even with the playing field at ground level.

North Scott's dugouts are much larger than Assumptions, level with the playing field, and appear much farther from home plate and the baselines than Assumption. (App. 439, Ex. C pg. AHS0094)

Clinton's dugouts are much larger than the Assumption visitor's dugout, and appear to be much further from home plate and the foul hazard than Assumption's visitor's dugout. (App. 439, Ex. C pg. AHS0095)

Burlington's dugouts shown by the defendant's photographs (App. 439, Ex. C pg. AHS0096) are level with the playing field, covered with only

a half screen topped with yellow protective tubing. Unfortunately from the photographs, it is impossible to tell their relative size compared to the Assumption dugout. More importantly, there is absolutely no information as to their relative location in the field and their distance or angle from home plate. (App. 439, Ex. C pg. AHS009)

One of Bettendorf's two dugouts shown in the proposed offer of proof is fully fenced and protected, compliant with ASTM F2000 and the Plaintiff's recommended precaution in this case. (App. 439, Ex. C pg. AHS0097) The other dugout for Bettendorf has only a half rail. Both Bettendorf dugouts are level with the playing field and there is absolutely no explanation why one is fully fenced from top to bottom and the other is protected from foul balls by only a half fence. Defendant provided no information concerning the relative location of either Bettendorf dugout. That is, there is no information as to the relative location or distance from home plate of either Bettendorf dugout in the offer of proof. (App. 317, Tr. 733:21-741:5; App. 439, Ex. C, pg. AHS0097)

Faced with these disparate facilities throughout the MAC, and the admissions of the defendant's expert, the District Court was well within its discretion to exclude these other dugouts.

2. Defendant Appellant failed to provide sufficient foundation to demonstrate any relevance of the "other dugouts".

Defendant-Appellant never provided essential foundation and evidence necessary to qualify any of the “other dugouts” as “relevant” to the issue of whether or not Assumption was negligent in the maintenance of its dugout. Even if it had, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion on the issues, misleading the jury, or by considerations by undue delay, waste of time, or needless presentation of cumulative evidence. (See IRE 5.403).

Plaintiff Appellee would point out that during the entire offer of proof (App. 317, Tr. 733:21-741:5). Defendant offered no foundation with respect to any of the “other dugouts” such as:

- a.) The physical size of each dugout.
- b.) The location of each dugout relative to home plate where foul balls originated.
- c.) The experience of each school with respect to foul balls actually striking the dugout or entering the dugout during games.
- d.) Whether each dugout was level with the playing field or, as Assumption visitor’s dugout, a sub grade dugout below the level of home plate. (App. 317, Tr. 733:21-741:5)

This is not a complex, technical case. No doubt the jury had seen other dugouts of different designs at other baseball games. When pressed, even Assumption had to admit that full fencing, gates, or full fencing with a door at one end were all feasible and economically viable alternatives to Assumptions open doorways that close to the plate.

Faced with disparate dugout designs and foul ball protection throughout the “other dugouts” and with no foundation to make any relevant comparison between Assumptions dugout and the proffered evidence, the District Court had no choice but to exclude the evidence. The District Court appropriately focused the jury’s attention on the foul ball hazard created by the location and angle of the Assumption dugout and Assumptions conduct.

Even if there was any relevance in a comparison with other dugouts, the court appropriately ruled that trying to compare Assumption’s facility with others had minimal relevance and would have plunged the trial into a dugout by dugout comparison with each school in the conference. The foul ball hazard presented by each dugout differed by location and angle from home plate. Each school would have been expected to have had a different level of experience with foul balls entering its dugouts. Defendant provided no history or information as to why each school chose the type of dugout design (which were all fairly different) that they did.

IV. THE DISTRICT COURT CORRECTLY REFUSED TO SUBMIT PROPER LOOKOUT AS AN ALLEGATION OF COMPARATIVE FAULT.

A. Preservation of Error

Plaintiffs- Appellee agrees that Assumption preserved the issue of submission of “proper lookout” for appellate review.

B. Standard and Scope of Review

Plaintiff-Appellee agrees that Defendant-Appellant has correctly stated the appropriate standard of review with respect to this appellate issue.

C. Discussion

1. All witnesses who observed plaintiff at the time of injury testified that he was facing the field and watching the game.

In its argument concerning the third issue of alleged error (the failure to issue a “proper lookout” instruction) Assumption conveniently omits the trial testimony of all persons who were eyewitnesses to the actual impact. Defendant- Appellant also attempts to confuse “proper lookout” with the issue of Ludman’s location in the visitor’s dugout at the time of injury.

All testimony of eyewitnesses confirmed that Spencer Ludman was facing the field, and watching the baseball game at the time Brooks Wagner hit the line drive foul which struck Mr. Ludman.

Assumption produced no evidence that even if he had been staring at the baseball when it came off Wagner’s bat, Ludman would have had the

opportunity to recognize the inbound ball and get out of the way. Assumptions Coach Argo testified that he saw Ludman begin to duck and even bring his hand up to “defend himself”.

All eyewitnesses who testified described the time between the ball hitting the bat and connecting with Ludman’s head as a “split second” or words to that effect.

So under the actual evidence presented at trial, as opposed to the characterizations of Defendant-Appellant, the evidence was undisputed that:

a.) Spencer Ludman was watching the baseball game in front of him when the fateful foul ball was hit by Brooks Wagner.

b.) Despite having excellent reflexes, and seeing the ball inbound out of his peripheral vision, Ludman had insufficient time to recognize the danger and get completely out of the way.

Indeed, the proximity of the visitor’s dugout to home plate identified by Coach Leech, Coach Panther, and Coach Ravenscroft created a situation where even an attentive player would not have the opportunity to recognize and inbound foul ball (or bat) and get out of the way.

The District Court properly refused to submit a “lookout” instruction with the following comment and ruling:

“As to the proper lookout, I do believe that there is evidence- The direct evidence of everyone was that he was

facing the field. He was watching the game. He was encouraging or whatever. There's issues of whether he was- the only thing that I can point to in the evidence would be the newspaper article talking about him taking off the batting helmet, which seemed to infer that he had turned, and I don't believe anybody-there was no testimony before us here of any eyewitness that said he actually turned his back. That was the whole batting helmet thing. I do find that the motion should be granted as to proper lookout..." (Emphasis Mine.)

2. Assumption produced no evidence from which a jury could find that any alleged lack of proper lookout was a cause of damage.

The District Court correctly ruled that there was no evidence from which the jury could find that the plaintiff was not facing the field and watching the game at the time the injury occurred. Even if there was any evidence of lack of a proper lookout, defendant failed to prove that plaintiff's alleged failure to have a proper lookout was a cause of his damage. Because Assumptions placed its dugout so close to home plate, the time between the foul ball tip and impact in the dugout was a split second.

ISSUE ON CROSS APPEAL

V. THE DISTRICT COURT ERRED WHEN IT FAILED TO GRANT PLAINTIFFS MOTION FOR DIRECTED VERDICT CONCERNING PLAINTIFFS ALLEGED COMPARATIVE FAULT FOR MERELY STANDING IN OR NEAR THE SOUTH DOORWAY OF THE ASSUMPTION DUGOUT.

A. Preservation of Error

At the close of evidence, plaintiff's counsel moved for directed verdict on all issues of alleged comparative fault on the part of Spencer

Ludman. (App. 345, Tr. 886:6-895:3) The District Court granted Plaintiff's motion for directed verdict as to all allegations except whether Ludman could have avoided the injury by standing at a different part of the dugout. (App. 347, Tr. 894:10- 894:25.)

B. Standard and Scope of Review

Plaintiff agrees that the appropriate standard of review for this issue on cross appeal is the same as Defendants described for Defendant-Appellant's issue number 3.

C. Discussion

1. Assumption failed to prove comparative fault on the part of Spencer Ludman due to unreasonable failure to avoid injury.

The only evidence presented to the jury was that at the time he was hit by the foul ball, Spencer Ludman had no place to stand or wait to retake the field other than the South doorway of Assumptions visitor's dugout. Once Spencer Ludman arrived at Assumptions ball field on the afternoon of July 7, 2011, his only choice was to stand or sit inside the visitor's dugout provided by Assumption. In Coker v. Abell-Howe Company 491 NW 143 (Iowa 1992) the Iowa Supreme Court clarified the distinctions between "assumption of risk and unreasonable failure to avoid injury. Coker, Id.

To submit the issue of comparative fault to the jury, the burden of proof was on Assumption to prove, by substantial evidence in the record,

that Spencer Ludman, at the time of his injury, unreasonably failed to avoid injury. See Coker, Id. at 149-150 And Greenwood v. Mitchell 621 NW 2nd 200 (Iowa 2001).

Spencer Ludman was far from free to choose where he stood on the afternoon of July 7, 2010 when he thought he might have to bat or retake the field.

Coach Leech forbid Ludman from using the North door of the visitor's dugout because it presented an even higher danger of being hit by a foul ball during the game. That left only the South door for Ludman to don his equipment (batters helmet and batting glove) and wait to emerge on deck if Brooks Wagner got a hit.

Nether Assumption nor Coach Leech had any rules preventing Ludman from moving to the position in the South door precisely because he needed to be ready to move on to the field.

In other words, Spencer Ludman did not stand in the South door of the visitor's dugout solely by choice. He could not use the North door. He was instructed to prepare too emerge on deck if that occurred, and he was preparing to emerge because he donned his batting helmet and glove before Brooks Wagner had two strikes against him.

The only evidence before the jury was that after Ludman was prepared to use the South door to follow the instructions of his coach and the normal procedures of the games at Assumption, it became evident that Wagner might not get a hit. Then, and only then, as instructed by his coach, Ludman removed the protective equipment (helmet and batting glove) and donned his regular hat.

Ludman then turned and stood next to his teammate, McConnaughey to cheer on his teammate and retake the field.

The only evidence before the jury was the Assumption dugout was so crowded that he had nowhere to stand, other than in the doorway with McConnaughey. (App 275, Tr. 553:15 – 554:5).

Assumption presented absolutely no evidence to contradict Ludman's statement that he had no choice but to remain in the South doorway next to McConnaughey before he was hit with the baseball.

Unlike the plaintiff in Coker, Id., Ludman was watching the game in front of him (so no negligence for lack of proper lookout) and he was standing in the only area available to him at the time.

Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. Coker, Id. at 150 (other citations omitted.)

The only question which Assumption asked Spencer Ludman is if he would have been hit by the baseball if he had been standing behind the fence. Assumption never proved by any testimony or evidence that, after Ludman removed the batting helmet and turned around he had the space or opportunity to move somewhere behind the fence. The limited and narrow question posed by Assumption was irrelevant and had no bearing on the issue of comparative fault. The appropriate and relevant question to Ludman and any one of the other players/coaches who were in the dugout with Ludman should have been “After Spencer Ludman took off his batting helmet, and turned around to watch the game, was there any room for him to stand in a more protected location before the foul ball flew into the south door?” Assumption failed to ask anyone this fundamental question necessary to support its allegation of comparative fault.

The only evidence before the jury was that Ludman was standing in a dugout with approximately fifteen or sixteen other individuals (players and coaches) along with player’s bags, a cooler and a large trash can. Coach Leech would not allow anyone to sit or stand near the North end. Unlike the plaintiff in Coker, Ludman’s action in standing in or near the doorway were actually the result of circumstances that required his presence in or near the

doorway, some of which were actually created by the Defendant, Assumption.

2. Ludmans presence in the south doorway was not the result of a free and independent choice, but created by his role as a high school player, directions from other adults, and even Assumptions own conduct.

While Ludman was certainly aware of the possibility that a foul ball could enter the South door of the dugout, his role as a potential batter and a member of the Muscatine team required that he go to that doorway and be prepared to emerge onto the field of play if that need arose. His testimony was that, after it became apparent that he would not have to stand in or near the South door to emerge to bat, he donned his regular baseball cap got his field glove and turned back to watch the game. He testified that at that point, there was “nowhere else to stand”, so he put his foot on the step inside the dugout, cheered on Brooks Wagner, and watched the game progress. Under these circumstances, the court should not allow Ludman’s actions to be characterized as an unreasonable failure to avoid injury. He was in a position that physically required by his role as the next batter after the man on deck. He was near the South doorway precisely because his coach would let no one stand or sit near the North doorway due to the foul ball hazard.

In other words, at the time he stood in the South doorway of the Assumption visitor’s dugout, Ludman was an eighteen year old high school

baseball player who was doing precisely what he was instructed and expected to do by his coach and teammates. Without proof that he could reasonably have moved to a position of greater safety in the brief time between removal of the batting helmet and when he was hit by the foul ball, the court should not have submitted the issue to the jury.

Unfortunately, the District Court's ruling on plaintiff's motion for directed verdict on the issue of unreasonable failure to avoid injury confused general testimony about the protection which was or was not afforded by the Assumption dugout, and the precise circumstances which existed at the time of injury. The courts confusion is evident in the ruling:

THE COURT: "Right. Ok. After considering the arguments of counsel and the evidence, I will grant it as to the batting helmet, and as to the part about the avoiding the injury by standing, plaintiff seems to argue that the defendant should be held to a different standard than they are in such that the plaintiff is arguing that he had nowhere else to stand, but there is no evidence that he didn't other than somebody's opinion.

There is no evidence that he couldn't have stood in front of the bench. There was evidence that the batting-actually, the batting helmets and everything to get ready to bat were at the opposite end of the dugout and so I find that there is a jury question as to whether there was all kinds of talk- all kinds of questions on both sides about where if somebody was standing behind the fence, would that have provided protection, so I am going to allow that one to go through."

There was no evidence in the record that, immediately before Ludman's injury that there was any room to stand "behind the fence" which was unoccupied by other coaches or team members.

Hence, the record before the jury was devoid of any evidence of an opportunity of Spencer Ludman to move out of the hazard posed by the south doorway or to a position of complete protection (as suggested but never proven by the defendant) before the injury.

CONCLUSION

1. This appellate court should affirm the District Court's ruling denying application of the "limited duty" doctrine to the facts of this case.

2. In the alternative, this appellate court should affirm the District Court's ruling, because Assumption created a greater danger of being hit by a foul ball while in Assumption's dugout than would normally occur in regular play.

3. This appellate court should affirm the District Court's ruling that plaintiff produced sufficient evidence to support the verdict against Assumption.

4. This appellate court should affirm the District Court's ruling which refused to submit the issue of Spencer Ludman's comparative fault based upon alleged lack of proper lookout.

5. This appellate court should reverse the District Court's submission of Spencer Ludman's comparative fault based on alleged unreasonable failure to avoid injury, and remand this action to the District Court with instructions to vacate that portion of the jury's verdict finding 30% fault against Spencer Ludman, and amending the judgment for the full amount of damages awarded by the jury.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee/Cross-Appellant requests to be heard in oral argument.

Respectfully submitted,



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CERTIFICATE OF COST


The undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Brief and Argument was n/a (e-filed), exclusive of sales tax, delivery, and postage.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 13,548 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Time New Roman.


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CERTIFICATE OF SERVICE

The undersigned certifies a copy of Plaintiff-Appellee's Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 29th day of April, 2016:

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